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No. 87-981 and 87-1028
Consolidated

In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION
AND BEECH AEROSPACE SERVICES, INC.,

Petitioners,

vs.

JOHN C. RAINEY,

Respondent.

BEECH AIRCRAFT CORPORATION
AND BEECH AEROSPACE SERVICES, INC.,

Petitioners,

vs.

RONDI M. KNOWLTON,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For the Eleventh Circuit

REPLY BRIEF OF PETITIONER BEECH AIRCRAFT CORPORATION (CASE NO. 87-981)

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INTRODUCTION

Respondents ask the Court to adopt a restrictive interpretation of Rule 803(8)(C) which would withhold trustworthy, probative and potentially unique evidence from consideration by the finder of fact. Petitioner Beech respectfully submits that such a construction would create an unwarranted obstacle in the ultimate search for truth, contrary to the stated purpose and intent of the Federal Rules of Evidence.[1]

I.

THE TRUSTWORTHINESS OF THE JAG REPORT HAS ALREADY BEEN CONCLUSIVELY DETERMINED.

The first issue presented for the Court's consideration is whether evaluative findings in trustworthy public reports are admissible pursuant to Fed.R.Evid. 803(8)(C). By arguing that LCDR Morgan's findings were unreliable or that they were surprised by the admission of his report, Respondents detract from the issue presented.

The trustworthiness of a report of an investigation conducted pursuant to law should be the central focus of inquiry under Rule 803(8)(C). *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983). (" . . . once a report is conclusively shown to represent findings of a public agency made pursuant to an investigation authorized by law, the central inquiry becomes

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[1] All parties to the proceeding below have been listed at Page ii of Petitioner's Initial Brief.

whether the report is trustworthy"). The burden is on the party seeking to exclude a public report to demonstrate that its findings are unreliable. *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984).

In the present case, the Respondents knew from the earliest stage of this litigation of the existence of Morgan's report and the substance of its findings. Notwithstanding this knowledge, Respondents made no effort to depose Morgan, attack his findings or discredit the methodology which he employed. Thus, the trial court, the panel and the *en banc* court concluded that LCDR Morgan's report was trustworthy for purposes of Rule 803(8)(C). *See Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1527 (11th Cir. 1986) (" . . . because no evidence was introduced to show that the report lacked trustworthiness, we find that the report was indeed trustworthy.") (J.A.35, 119-133)

For Respondents to argue now in this Court that Morgan was unqualified to conduct the investigation or that his report was otherwise unreliable is improper. The time to have challenged this report was during the extensive discovery period, at pretrial and/or at trial.[2] Having failed to do so, Respondents cannot now attack either Morgan or his findings. These matters are simply no longer at issue.

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[2] The trial court granted Respondents' request to call previously unlisted witnesses to challenge the findings in the Jag Report. (J.A.42) Notwithstanding this permission, Respondents called no witnesses for this purpose.

Likewise, Respondents' contention that they were surprised by the admission of the Jag report is unfounded. All parties were aware throughout this litigation that the Defendants would seek to admit the *entire* Jag report into evidence. To this end the Defendants continued throughout the pretrial period to tender argument and legal memoranda to the trial court in support of broad admissibility. (R. 1293-1304, 1328-1331, 1440)

Once a decision was reached to admit the evaluative findings in the report, the Respondents did not seek a continuance, and they declined the Court's invitation to present evidence on this issue. Therefore, their present contentions regarding surprise are not supported by the record. *See Rainey v. Beech Aircraft*, 784 F.2d at 1527 ("Rainey and Knowlton knew months before trial that the defendants would seek to admit Lieutenant Morgan's report into evidence. Still, Rainey and Knowlton made no effort to attack the qualifications of Lieutenant Commander Morgan or the methodology he employed in conducting his investigation.")

The Morgan Jag report is a trustworthy record of an investigation conducted pursuant to law, and its purpose was well known to the Respondents. The issue to be determined by this court is whether 803(8)(C) contemplates admission of the report's evaluative findings. To raise questions now concerning Morgan's qualifications and the Respondents' alleged surprise improperly detracts from the issue presented.

II.

ALTHOUGH THE LEGISLATIVE HISTORY OF RULE 803(8)(C) IS EQUIVOCAL, THE INTERPRETATION ADOPTED BY THE SENATE, THE ADVISORY COMMITTEE AND THE MAJORITY OF CIRCUITS REPRESENTS THE PREFERRED VIEW.

The Senate and House developed opposing views on the appropriate interpretation of Rule 803(8)(C). The House advocated a narrow construction of the rule, with the Senate adopting the Advisory Committee's position in favor of broad admissibility. *See* Report of the Committee on the Judiciary H.R. Rep. No. 93-650, 93rd Cong., 1st Sess. 14 (1973). Report of the Committee on the Judiciary S. Rep. No. 93-1277, 93rd Cong., 2d Sess. 18 (1974). This conflict was never resolved, as the Congressional Conference Committee made no reference to the appropriate scope of Rule 803(8)(C). *See* Notes of Conference Committee H.R. Conf. Rep. No. 1597, 93rd Cong., 2d Sess. (1973).

Although the legislative history is, at best, equivocal, Respondents urge that the House view should be followed because the Senate failed to amend the text of Rule 803(8)(C) as approved by the House. This reasoning, however, provides no basis for such a construction of the Rule. The House itself made no change in the language of Rule 803(8)(C). Therefore, Respondents' argument, taken to its logical extreme, would seem to favor the broad interpretation advocated by the advisory committee, as neither the House nor Senate amended the Rule as drafted.

Logic would favor the Senate construction of the Rule because it is in agreement with the advisory committee, and the Senate was the last legislative body to consider the issue. If the House intended to continue its challenge to the interpretation adopted by the Senate and Advisory Committee, then one would expect specific mention of the point in the report of the Conference Committee. *See* Notes of Conference Committee H.R. Conf. Rep. No. 1597, 93rd Cong., 2d Sess. (1973). The report, however, is silent on the issue.

In commenting on the House's narrow construction of this Rule, Judge Weinstein has noted:

> . . . the Senate Committee on the Judiciary strongly disagreed with this narrow view. Since no reference to the differing approaches was made in the Conference Report, no inference should be drawn that the Senate's liberal interpretation was withdrawn. A broader conception of the phrase "factual findings" is consonant with the Advisory Committee's Note, which accepted "evaluative reports" as being within the scope of Rule 803(C), and with the general thrust of the Federal Rules of Evidence. (citations omitted, emphasis in the original)

See 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 803(8)[03] (1985). *See also* M. Graham, *Handbook of Federal Evidence* § 803.8 (1980) ("The report of the Senate Committee advances the preferred position"). The interpretation advanced by the Senate, in favor of broad admissibility, has also been adopted by the overwhelming majority of courts which have addressed this issue. *See generally, United States v. American Telephone & Telegraph Co.*, 498 F. Supp. 353, 359 (D. D.C. 1980) ("Extrinsic materials indicate that the Rule is

most appropriately considered by following the Senate Committee's position.")

Thus, contrary to Respondents' contentions, the conflicting legislative history of this Rule does not favor the narrow interpretation advanced by the House. If anything, the available history indicates that the Senate position is correct, as it came later in time and is in full agreement with the interpretation advanced by those who drafted the Rule.

Respondents also contend that a restrictive interpretation is supported by the plain language of the Rule. This assertion, however, does not withstand scrutiny. As urged in our initial brief, the phrase "factual findings" is literally defined as, "[a] conclusion by way of reasonable inference from the evidence." Black's Law Dictionary 569 (5th ed. 1979). *See also Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987) (. . . "a 'finding of fact' refers to the result or conclusion drawn by an investigator, whether it be a fire inspector, judge, or jury, 'from facts without exercise of legal judgment.' ") 827 F.2d at 1510. Thus, a literal reading of the Rule fully supports the Senate's position in favor of broad admissibility. This interpretation of the phrase "factual findings" is also supported by the advisory committee, which clearly intended the Rule to have a broad construction. *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S. Ct. 2054, 60 L.Ed.2d 661 (1979). ("The advisory committee notes, however, accept evaluative reports as being within the meaning of factual findings under Rule 803(8)(C).") If the advisory committee believed that the phrase "factual findings" did not encompass

evaluative conclusions, it clearly would have amended the language to include these findings. Petitioner believes that the advisory committee correctly concluded that the phrase "factual findings," fairly read, is broad enough to include evaluative conclusions derived from an examination of the underlying facts.

Thus, if this Court applies the Rule according to its facial terms, the findings contained in the Jag report would be properly admissible as evidence.

Respondents also attempt to support a narrow construction of the Rule by noting that Rule 803(6) contains the words opinions and diagnoses. Respondents hypothesize that if evaluative findings were intended to be admissible under 803(8)(C), then language similar to that adopted in 803(6) would have been used in the Rule. This argument, however, ignores the fact that the drafters of Rule 803(8)(C) expressly provided that evaluative findings should be admissible in the first instance. *See* Fed.R.Evid. 803(8)(C) advisory committee note. In view of this statement of intent by the advisory committee, a comparison of different evidentiary principles, which are designed to apply to totally separate instances, provides no support for the narrow interpretation now urged by the Respondents.

Additionally, as suggested by Judge Tjoflat in his special concurrence in the *en banc* opinion, the only reason the words opinions and diagnoses appear in 803(6) was because prior model evidence rules had contained ambiguous language concerning the admissibility of such findings under the regular entries rule. *See Rainey v. Beech Aircraft*, 827 F.2d 1498, 1511, 1512 (11th Cir. 1987). Prior to enactment of the current Federal Rules of Evidence, opinions and diagnoses were

not normally encountered in traditional business records. Now, however, such findings commonly appear in medical records, and the advisory committee wanted to make abundantly clear its adherence to the trend favoring admission of such findings under the regular entries rule. *Id.* at 1512. Given this explanation for the appearance of the words opinions and diagnoses in 803(6), Judge Tjoflat correctly concluded that such language offers no support for a narrow interpretation of 803(8)(C). ("Given this account of why the regular entries rule makes explicit reference to diagnoses and opinions, it strikes me as absurd to cite the language of that rule [803(6)] as support for an argument limiting the scope of factual findings.") In fact, as noted in Judge Weinstein's treatise, a narrow construction of 803(8)(C) would be *inconsistent* with 803(6).

> . . . any attempt to ascribe a severely restricted significance to the phrase 'factual findings' in all cases would be inconsistent with Rule 803(6), . . . No legislative history points to any intent on the part of Congress to limit the public records exception so as to exclude records which had previously qualified for admission pursuant to the business entries exception.

4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 803(8)[03] (1985)[3] As these authorities indicate, the language in Rule 803(6) does not support a restrictive interpretation of 803(8)(C).

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[3] Neither the Senate, House nor Conference Committee notes to Rule 803(8)(C) discussed the use of the terms opinions or diagnoses in 803(6), or how these words may differ in scope from the phrase "factual findings." *See Rainey*, 827 F.2d at 1512.

III.

SMITH V. ITHACA IS AN ANOMALY AMONG THE CIRCUITS AND IS IN CONFLICT WITH SEVERAL DECISIONS OF THE FIFTH CIRCUIT.

Notwithstanding the Respondents' contentions to the contrary, Beech respectfully says that Judges Tjoflat and Johnson correctly characterized the holding in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), as an "anomaly among the circuits." *Rainey v. Beech Aircraft Corporation*, 827 F.2d 1498, 1515 (11th Cir. 1987) (Tjoflat, J., concurring specially.) *Rainey v. Beech Aircraft*, 784 F.2d 1523, 1530 (11th Cir. 1986) (Johnson, J., concurring specially). Even accepting the argument advanced in Respondents' brief, it is apparent that of the ten circuits to address this issue, eight have squarely held that broad admissibility under 803(8)(C) is the preferred approach.[4] Beech respectfully suggests that this balance of authority qualifies *Smith v. Ithaca* as an anomaly among the circuits, particularly since the Fifth Circuit has failed to follow *Ithaca* on several occasions.

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[4] Respondents' contention that the Second Circuit follows the Fifth Circuit's narrow interpretation of Rule 803(8)(C) is not well founded. One of the strongest statements in favor of broad admissibility under 803(8)(C) is found in *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 700 F.2d 785, 818 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984). In that case the court upheld the admission of

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Decisions of the Fifth Circuit prior to *Smith v. Ithaca* approved the admission of evaluative conclusions contained in government reports. *See McCarty v. United States*, 185 F.2d 520 (5th Cir. 1950) (admitting as evidence certificate of settlement by GAO showing amount of defendant's indebtedness to the government), *see also, Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975). Interestingly, the *McCarty* decision is cited in the advisory committee note to 803(8)(C) in support of broad admissibility of evaluative findings. For some unarticulated reason the Fifth Circuit *Ithaca* panel chose not to follow the *McCarty* precedent.

Fifth Circuit decisions after *Ithaca* have also approved the admission of evaluative reports pursuant to 803(8)(C). *See Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543, 547 (5th Cir. 1982); *Local Union No. 59, International Brotherhood of Electrical*

(Continued from previous page)

FCC decisions that characterized AT&T tariffs as "unjust and unreasonable discrimination" and "unnecessarily restrictive." The court reasoned that these evaluative conclusions constituted "factual findings" within the meaning of rule 803(8)(C). In its most recent consideration of the issue, the Second Circuit adhered to *Litton*, holding that conclusions in FBI reports regarding the genuineness of a signature were admissible pursuant to Rule 803(8)(C). *See Bradford Trust Company of Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49 (2d Cir. 1986). Thus, for Respondents to urge that the Second Circuit follows the Fifth Circuit's construction of Rule 803(8)(C) is, we believe, an incorrect statement of existing Second Circuit law.

Workers v. Namco Electric, Inc., 653 F.2d 143 (5th Cir. 1981); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). In each of these subsequent decisions the court did not feel compelled by *Ithaca* to exclude evaluative government reports.

In sum, Fifth Circuit decisions both before and after *Ithaca* have admitted evaluative conclusions contained in government reports. The court in *Ithaca* ignored its own existing precedent and relied entirely upon a district court decision to support exclusion of the evaluative portions of a Coast Guard report. *See Complaint of American Export Lines, Inc.*, 73 F.R.D. 454 (S.D.N.Y. 1977). This district court opinion, however, is not followed even in the circuit from which it emanates, and it provides a wholly insufficient reason for deviating from existing Fifth Circuit precedent. *See Bradford Trust Company of Boston*, 805 F.2d 49 (2d Cir. 1986).

Although recent cases in the Fifth Circuit have adhered to *Ithaca*, that court last year expressed some reluctance in doing so. In *McQuaig v. McCoy*, 806 F.2d 1298 (5th Cir. 1987), the court noted that it was compelled to follow *Ithaca* until overruled by the Fifth Circuit *en banc* or by the United States Supreme Court. *See McQuaig*, 806 F.2d at 1302. Similarly, in its original opinion in *Rainey*, the Eleventh Circuit noted that it was not free to adopt the prevailing interpretation of Rule 803(8)(C), as it was constrained to follow

existing Fifth Circuit precedent on this issue. *Rainey v. Beech Aircraft Corporation*, 784 F.2d at 1528.[5]

The overwhelming majority of courts support broad admissibility of evaluative findings pursuant to Fed.R.Evid. 803(8)(C). The Fifth Circuit's isolated decision to the contrary is inconsistent with its own precedent on this issue and provides little by way of legal analysis to support a restrictive interpretation of this Rule.[6]

IV.

THE DISPUTED FINDING IN THE JAG REPORT WAS AN EVALUATIVE CONCLUSION DERIVED FROM AN EXAMINATION OF THE FACTS WITHOUT EXERCISE OF LEGAL JUDGMENT.

Respondents' objection to the Morgan Jag report can be traced to the admission into evidence of the following single finding:

> The most probable cause of the accident was the pilot's failure to maintain proper interval.

(J.A.15) This evaluation was based on an express factual determination also present in the same report:

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions issued prior to September 1981.

[6] In *Ithaca* the Fifth Circuit relied upon a comparison of 803(6) and 803(8)(C) to support a narrow construction of the phrase "factual findings." As was previously noted, however, a comparison of these two rules does not support a narrow interpretation of 803(8)(C).

> At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned.

(*See* finding #13 J.A.10) As these excerpts indicate, Morgan's evaluative conclusion was simply an inference drawn from a specific finding which appeared of record in his report. This evaluative finding, however, did not reach a legal conclusion, make a finding of negligence or otherwise attempt to attribute ultimate fault. Fairly read, this finding simply speaks in terms of probabilities with regard to the potential causes of an accident. Such a finding is not the equivalent of a determination of legal liability. Instead, it amounts to nothing more than an evaluation of existing facts without exercise of legal judgment. *Rainey,* 827 F.2d at 1510. Admission of such findings can only serve to aid the jury in its search for truth and is of the type which has been admitted routinely by the circuit courts.[7] *See Rainey*, 827 F.2d at 1510.

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[7] The admission of the unbiased Jag findings was particularly important because the death of the pilots and the total destruction of their aircraft placed a premium on expert evidence. *See Rainey,* 827 F.2d at 1507. Commander Morgan was the only impartial individual to investigate this matter at or near the time of the accident. To shield his trustworthy findings from the jury would impede the search for truth. Respondents contend that the parties should be required to produce their own experts to prove their case, without reliance upon impartial governmental findings. Professor McCormick, however, believed that it was this very impartiality and freedom from taint which required admission of such trustworthy findings. McCormick – Can The Courts Make Wider Use Of Reports Of Official Investigations? 42 Iowa L.Rev. 363, 364-365 (1957).

Respondents' invitation to limit the scope of Rule 803(8)(C) to purely factual matters, aside from being contrary to the Rule's stated purpose, would lead to confusion, increased litigation and frustrate the ultimate search for truth. As Petitioners urged in their initial briefs, a clear-cut distinction between fact and opinion is impossible to draw. 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 803(8)[03] (1985). This difficulty arises from the reality that all findings, no matter how factual, are to one degree or another evaluative because they involve the perception, training and experience of the individual collecting the data. See Oliphant, *Facts, Opinions, and Value – Judgments*, 10 Tex.L. Rev. 127, 133 (1932). Even pure fact finding is a filtering process by which an individual reports his inferences from the stimuli presented, thus rendering the findings evaluative in nature. This is particularly true when an investigator is reporting matters which have been related by third parties. To determine when such findings cease being factual and become evaluative is an impossible task. Oliphant, *Facts, Opinions, and Value – Judgments*, 10 Tex.L.Rev. at 133. (. . . "The point at which what we now call facts shades off into what we now call opinions [can] not be detected.") It is unfair to suggest that trial judges should have the responsibility of making these hairsplitting distinctions, or that the admissibility of potentially critical evidence should depend upon a determination of these rather amorphous concepts. More appropriately, the court should direct its attention toward a determination of whether the report at issue contains sufficient indicia of trustworthiness. If it does, and it contains a

finding which is helpful to the jury, it should be admitted for consideration by the finder of fact. *See Rainey*, 827 F.2d at 1512. This will facilitate the ultimate search for truth and prevent the creation of a new series of appeals which seek to challenge the court's fact/opinion determination.

Respondents also urge that if a broad construction of Rule 803(8)(C) should be adopted by the Court, that admission be limited to normative conclusions, that is, findings which conform to an authoritative standard. Such a construction, however, would be contrary to the purpose of 803(8)(C) and would convert the rule into one of exclusion, rather than one of inclusion. *See* Fed.R.Evid. 803(8)(C) advisory committee note (the Rule presently assumes admissibility in the first instance). Additionally, drawing a distinction between normative conclusions and other evaluative findings is not supported by the Rule or the case law construing it. In fact, although Respondents rely upon *Weinstein's Evidence* Treatise and *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1125 (E.D. Pa. 1980), *aff'd in relevant part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), to support their narrow interpretation of Rule 803(8)(C), neither of these authorities stands for the proposition that admissibility should be limited to normative findings. Both of these authorities, in fact, advocate a broad construction of the phrase "factual findings" as contained in Rule 803(8)(C). *See Zenith*, 505 F. Supp. at 1144 (" . . . we think the term is broad enough to encompass any statement of fact that represents a conclusion on the part of

an investigator. . . ."). *See also* 4 J. Weinstein & M. Berger *Weinstein's Evidence* § 803(8)[03] (1985) ("If the report states a conclusion that would be helpful – and is reliable – it should be admitted"). Further, the notion of limiting admissibility under 803(8)(C) to normative conclusions finds no support among the decisions of the circuit courts.

It is respectfully submitted that drawing a distinction between normative conclusions and other evaluative findings would require trial judges to grapple with unworkable distinctions and result in the unnecessary exclusion of trustworthy probative evidence.

Respondents' reliance upon the definitions contained in the manual of the Judge Advocate General is also misplaced. Respondents contend that since the Jag manual separately defines findings of fact and opinions this Court should adhere to these designations and exclude Morgan's evaluative findings. This contention, however, is in error, as the scope of the phrase "factual findings" contained in 803(8)(C) cannot be modified, restricted or otherwise defined by definitions contained in a military manual. Additionally, the definitions contained in this manual actually support a broad interpretation of the Rule. The Jag manual defines opinions as:

> Logical inferences or conclusions which flow from the facts.

Manual of the Judge Advocate General 0608(d). Interestingly, this definition closely parallels the definition of finding of fact contained in Black's Law Dictionary. It provides that a finding of fact is:

> [A] conclusion by way of reasonable inference from the evidence.

Black's Law Dictionary 569 (5th ed. 1979). As is apparent, the Jag manual's definition of opinion is almost identical to the legal definition accorded factual findings. As a result, the scope of Rule 803(8)(C) is clearly broad enough to include the Jag report findings which the military characterizes as opinions.

V.

INTRODUCTION OF PARTS OF A TRUSTWORTHY GOVERNMENTAL REPORT DID NOT CAUSE THE JURY TO ABDICATE ITS RESPONSIBILITY.

Respondents' final contention is that admission of the findings in the Jag report invaded the province of the jury. This conclusion, however, fails to give appropriate deference to the capabilities of the jury system, which has long been considered able to accord appropriate weight to particular pieces of evidence.

The Jag report excerpts were received like any other piece of evidence, with all parties remaining free to comment upon it or attack or support its findings. The jury was free to give the excerpts from this report whatever weight, if any, it felt warranted. *See Bradford Trust Company*, 805 F.2d at 54 ("The weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact"). Such functions are clearly within the capabilities of a jury under our system, and it is incorrect to assert that the admission of a single report in

the midst of this complex trial would cause the jury to abdicate its responsibility.

VI.

FEDERAL RULES OF EVIDENCE 106 AND 801(d)(1)(B) WERE IMPROPERLY APPLIED TO OVERTURN A JURY VERDICT REACHED AFTER TWO WEEKS OF TRIAL.

In their brief, Respondents offer nothing to alter the fact that Fed.R.Evid. 106 was never invoked during the testimony of LCDR Rainey. In fact, a review of the entire record reveals that this Rule of Evidence was never mentioned by Respondents throughout this entire proceeding, either at trial or on appeal. The trial judge had no way of discerning that Respondents sought to admit Rainey's hearsay opinion on proximate cause solely to place his early statements in context. Had counsel for Respondents articulated this for the court, its ruling may well have been different. In the context presented, however, the court's ruling excluding this opinion was eminently correct.

Finally, Petitioner Beech believes that a fair review of Rainey's trial testimony will show that Fed.R.Evid. 801(d)(1)(B) is totally inapplicable in this instance. Rainey had not been charged with a recent fabrication, and his testimony on direct was entirely consistent with his earlier statements. Such a scenario offers no predicate for the admission of Rainey's hearsay opinion under the guise of a prior consistent statement. Additionally, the jury was well aware of Rainey's theory of the case, as his position had been ably expressed through counsel and expert witnesses. To reverse a two-week jury trial simply because Rainey was prevented from articulating a hearsay opinion consistent with his

general theory of the case would be unwarranted. *See* Fed.R.Evid. 103(a).

CONCLUSION

For the reasons submitted, Petitioner Beech respectfully asks this Court to reverse the Court of Appeals and order reinstatement of the judgments of the Trial Court.

Respectfully submitted,

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